# State of Michigan

## In the

# Supreme Court

APPEAL FROM THE MICHIGAN COURT OF APPEALS
M.J. Cavanagh, P.J.; H.R. Gage and B.K. Zahra, J.J.

**PEOPLE OF THE STATE OF MICHIGAN,**
**Plaintiff-Appellant,**

**V**

**Supreme Court**
**No. 125483**

**RUSSELL DOUGLAS TOMBS,**
**Defendant-Appellee,**

**Court of Appeals No. 236858**
**Macomb Circuit No. 00-3534-FH**

## BRIEF ON APPEAL - APPELLANT


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## STATEMENT OF QUESTIONS INVOLVED

### ISSUE I

**DID THE COURT OF APPEALS ERR IN LIMITING THE PROSECUTION'S THEORY TO ONLY DISTRIBUTING AND NOT ALTERNATIVELY PROMOTING THE CHILD SEXUALLY ABUSIVE MATERIAL?**

**The Plaintiff-Appellant contends the answer is "YES".**

### ISSUE II

**DID THE COURT OF APPEALS ERR IN ADDING A MENS REA REQUIREMENT CONTRARY TO LEGISLATIVE INTENT?**

**The Plaintiff-Appellant contends the answer is "YES".**

### ISSUE III

**DID THE COURT OF APPEALS ERR BY HOLDING THAT THE PROSECUTION PRESENTED INSUFFICIENT EVIDENCE THAT THE DEFENDANT INTENDED TO DISTRIBUTE CHILD SEXUALLY ABUSIVE MATERIAL?**

**The Plaintiff-Appellant contends the answer is "YES".**

## TABLE OF CONTENTS

## INDEX OF AUTHORITIES

### Cases



### Statutes

## Other Authorities

## STATEMENT OF JURISDICTION

The Plaintiff-Appellant, the People of the State of Michigan, appeals from the published opinion of the Michigan Court of Appeals dated December 30, 2003, reversing and vacating the defendant-appellee's, Russell Douglas Tombs, conviction for Distributing or Promoting Child Sexually Abusive Material contrary to MCL 750.145c(3).

The Plaintiff-Appellant filed an Application for Leave to Appeal on January 21, 2004. On July 1, 2004 this Court accepted leave to appeal the Court of Appeals decision. (The defendant's application for a cross-appeal was denied).

The Plaintiff-Appellant respectfully requests that this Honorable Court, **REVERSE** the Court of Appeals, and **REINSTATE** the defendant-appellee's conviction and sentence for Distributing or Promoting Child Sexually Abusive Material.

## STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The defendant, Russell Douglas Tombs, was convicted, following a jury trial of Count 1, Distributing or Promoting Child Sexually Abusive Material, contrary to MCL 750.145c(3), Count 2, Using the Internet to Possess Child Sexually Abusive Material, contrary to MCL 750.145d and Count 3, Possession of Child Sexually Abusive Material, contrary to MCL 750.145c(4). The defendant was sentenced to 1 year, five months to 7 years on Count 1, 1 year 4 months to 24 months on Count 2 and 1 year in jail for Count 3.

The defendant's conviction and sentence for Distributing or Promoting Child Sexually Abusive Material was reversed by the Court of Appeals (the remaining charges and sentences were affirmed) in a published opinion decided December 30, 2003. (*People v Tombs,* Docket No. 23658, (12a-22a)).

In its decision, the Court of Appeals limited the prosecution's theory to only distributing and not alternatively promoting the child sexually abusive material. The Court of Appeals also narrowly construed the term "distributes" to include a *mens rea.* The Court of Appeals then found that the prosecution failed to present sufficient evidence that the defendant intended to distribute child sexually abusive material (as the Court of Appeals defined the term). The People now ask this Court to reverse the Court of Appeal's decision.

The defendant was employed as a technician for Comcast and was required to have a laptop computer. (28a-31a). On August 9, 2000, the defendant contacted Christopher Williams, Comcast supervisor of installation and services. The defendant indicated that he was quitting and wanted to turn his equipment in over the weekend. After checking with his boss, Williams advised the defendant that he had to turn in the equipment that day. The defendant said he would need an hour. As Williams' was driving to get the computer, the defendant called Williams to tell him everything was ready. Williams then went and picked up the defendant's Comcast truck and computer. (41a-43a).

A day later, Williams opened the computer up, started it up and looked to see whether it needed to be re-formatted before giving it to another technician. (45a-46a). Williams could have installed an eraser from the DOS format, but opened up the computer to see what was on it. (50a). Williams searched for picture or JPG files. Williams then clicked on the pictures to open one up. A picture of a young girl with her chest area exposed was displayed. Williams then clicked on another picture and saw the same girl in a different pose. At that point, Williams shut the computer down and gave it to Cliff Radcliff and told him that the computer needed to be reformatted. (47a-49a).

Radcliff was in charge of maintaining the computers by ensuring there was nothing questionable or offensive on the computer when an employee turned it in. (116a). Radcliff knew he was looking for

pornography when he turned the computer on. (116a-117a). Radcliff performed a search of the JPG files and found a listing of the picture files. (118a). When he viewed the pictures, he found adult pornography and then a series of child pornography. The pictures were very organized in the computer. After viewing two or three of them, Radcliff could not look at anymore. (119a). The pictures were "buried inside" of a user profile. (121a-122a).

Radcliff viewed the pictures because it was easier to go through and clean out any unneeded files rather than to eliminate everything in the computer system and then reinstall all the necessary software that the technicians need. (123a). The computers are to be used for business only per company policy. (42a).

Stephen Hill testified that prior to giving out the laptop, the hard drive of the laptop would be "cleaned of any information" that had been installed previously. (34a-35a). Radcliff came to Hill, very upset, because he was concerned that there was pornographic information on the defendant's laptop. (37a, 120a). Hill advised Radcliff to keep looking at the computer and then Hill turned the computer over to Human Resources. The computer was then given to the St. Clair Shores Police Department. (38a-39a).

St. Clair Shores Police Detective Edward Stack turned on the defendant's computer to see if he could find the questionable material. Detective Stack did not know that he should not have turned the

computer on because he could have destroyed or altered the evidence. (136a, 137a, 57a). Detective Stack went to the search mode of the desktop and typed in "asterisk star asterisk JPG" to find the "JPG" or picture files. (137a). Detective Stack received a list of 2,137 JPG files. The detective went to some of them. At first, he found photographs of adults and then photographs of sex acts and then he found photographs of children. (138a).

Oakland County Sheriff Sergeant Joseph Duke is an expert in computer forensic examinations and computer crimes investigation. (52a-54a). Sergeant Duke received the defendant's laptop and removed the hard drive from the computer so that the data could be acquired in a controlled environment. (57a-59a).

On the hard drive of Comcast's laptop computer, Sergeant Duke found over 500 images that he believes qualified as child sexually abusive material or child erotica. (61a). In fact, overall, Sergeant Duke found and documented 6500 photographs that qualified as child sexually abusive material in computers that belonged to the defendant. (60a).

Sergeant Duke explained that a portion of the Internet, Usenet, is a group of computers that are host computers or servers. They provide information when someone requests it. Special interest groups use them to host news groups. Some of the news groups are used for trading information on molesting children fantasies and child pornography. (62a). The defendant's laptop has a program installed "xnews.exe" which

is a Usenet newsgroup. This would allow the computer user to log onto the Usenet, subscribe to the newsgroups as well as download messages and files from Usenet. (104a-106a). A cable Internet service must be used to access Usenet. (109a-110a).

When requesting information, the user is communicating by telling the server to send you certain information and then it sends it to your computer. Sergeant Duke testified that "there's constant two-way communication going on" between the user and the server computer. (111a-112a). A wiping or deleting program had been installed into the defendant's hard drive but the sergeant could not determine whether the wiping program was used on August 8, 2000. (113a). In less than 15 minutes, files could be deleted from a computer. (107a-108a).

Sergeant Duke did determine that the defendant used the Internet with Comcast's computer because it had Internet access installed and had saved temporary Internet files. (63a). Sergeant Duke testified that People's Exhibit 2 are 78 images which were taken from the hard drive of the defendant's Comcast computer. (64a-65a, 71a-72a). The data was hidden 7 directory levels down. (70a). Sergeant Duke then described each of the images, when they were created and whether in his expert opinion they were of child sexually abusive material. (73a-92a, 94a-103a). Sergeant Duke testified that the images were taken from Internet websites. (92a).

These pictures show naked, crying young children with their genitalia exposed. Some also show adult males abusing these children by inserting their fingers or penises into the girls' vaginas and buttocks.

Sergeant Duke described the first picture of a naked female between 8 and 10 years old laying on her back with her genitalia exposed. (73a). This picture came from Usenet. (74a). Another Usenet picture was contained in a series that the sergeant has seen before. The picture showed the:

> "same 6 year old child lying on her back. Her pants are now pulled down around her knees. Her genitalia is exposed. She's still crying. This is child sexually abusive material from my experience." (76a-77a).

Another picture showed:

> "the same 6 year old female child. This time on her back holding her ankles apart. She's crying. Again, she's completely nude with the exception of whatever that is on her neck. The focus of the photograph is on her anus and on her vagina. The child is crying." (78a).

Another picture showed the little 6 year old girl:

> "lying on her stomach. There is an adult male straddled behind her between her legs inserting the tip of his penis in between her buttocks." (81a).

Another picture was of the 6 year old girl:

> "She has her right hand on an adult, this time fully erect penis. Its being pressed up against her mouth." (86a).

Another picture showed a girl between 13 and 15 years old:

> "naked on all fours on a bed. She is gaged (sic) with a ball bound some type of a strap around the back of her neck; and there is what appears to be a whip resting across her buttocks." The picture also showed an artificial penis near the girl's knee. (91a).

FIA worker David Joseph spoke to the defendant due to a referral based on the pornography and the home environment of the defendant's children. (125a-129a). At first, the defendant indicated that a chain of custody problem existed and that the materials had been added after he returned the computer and that they were not his. (130a). The defendant then admitted going to the Internet and exploring pornography. The defendant started with adult pornography and then found child pornography and indicated that he began to get pictures from the Internet. The defendant admitted to downloading and sharing the photographs with others. The defendant believed that when he returned the Comcast Computer, no one would go through the individual files, but rather the hard drive would be deleted. (131a-134a). The defendant had also thought he would have more time to clean the computer of the images than he ended up having. (133a-134a). The defendant stated that he was part of a club that would exchange and give child pornography. (134a-135a).

In his closing argument, the assistant prosecutor indicated that Count I included distributing or promoting child sexually abusive material and that the defendant was guilty of Count I if he either distributed or promoted such material. (142a-143a). The assistant

prosecutor indicated that Count 2 is the use of the Internet to distribute or promote child sexually abusive material or using the Internet to possess child sexually abusive material. Count 3 is the possession of the child sexually abusive material. (142a).

The assistant prosecutor argued with respect to Count 1, the Distributing or Promoting child sexually abusive material:

> "Defendant distributed in one way when he returned People IB, his laptop to Comcast. There is no element that the Judge will read you, nor did I in opening statement, there's no element that says Comcast wanted it."
>
> ***
>
> "Distribution. He gave it back to Comcast. He knew -- he, the defendant knew, from working there, and he used to do it, the testimony was, that the defendant knew that computer would be cleaned. The computer would be looked at." (144a).

The assistant prosecutor later argued why the defendant was guilty of promoting the material:

> ". . . but you can also . . . find him guilty of Count I if I only showed that he promoted it."
>
> ***
>
> "If nobody used this stuff, if nobody collected it, if nobody downloaded it, it wouldn't exist. Every time it is downloaded the 6500 plus times it was downloaded by the defendant that's promoting it." (150a).

The assistant prosecutor continued:

> "The more demand, the more there is -- that's promotion. And the computers have promoted it even more than ever. . . . It's been promoted by taking it off the Internet and collecting it. Sharing it with other people in your pedophile club." (151a-152a).

Following the arguments, the jury was instructed as to Count 1:

> "The defendant is charged with the crime of distributing or promoting child sexually abusive material. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt. First, the defendant must distribute or promote material. . . ." (153a).

After the jury was sent to deliberate, the jury asked to see some of the exhibits. (154a-155a). The jury then returned with a note indicating:

> "we need clarification on the definition of the law stated by the Judge on the terms distribute and promote. Is intent a factor?" (155a).

In answer to the jury's question, the trial court re-read the jury instructions for all of the charges involving the child sexually abusive material and then the trial court noted that the Legislature had not defined the terms "distribute" and "promote" and that the trial court could not provide a definition for them. The jury then returned to its deliberations. (155a-157a).

The jury later returned with a verdict. The jury found the defendant guilty of Count 1, distribution or promotion of child sexually abusive material, guilty of Count 2 using the Internet or a computer to possess child sexually abusive material and guilty of Count 3 possession of child sexually abusive material.

At sentencing, the trial court noted:

> "It's sad, because those kids are being victimized; and you're just adding to it by just looking at the pictures." (158a).

The defendant was then sentenced to 1 year, 5 months to 7 years on Count 1, 3 to 10 years for Count 2 and 1 year for Count 3. (158a-159a). Pursuant to a remand order by the Court of Appeals, the defendant was re-sentenced on September 18, 2002 on Count 2 to 16 months to 2 years.

The defendant appealed to the Court of Appeals by right. On December 30, 2003, the Court of Appeals reversed the defendant's conviction and sentence on Count 1, the Distribution and Promotion of the Child Sexually Abusive Material. (12a-22a).

On July 1, 2004, this Court granted the People's application for leave to appeal the Court of Appeals decision. This Court directed the parties to include among the issues to be briefed: "(1) whether the Court of Appeals properly construed the intent required for a conviction under MCL 750.145c(3); and (2) if so, whether there was sufficient evidence of intent arising from all of the evidence, including specifically (a) defendant's return of the computer to his employer, or (b) defendant's internet activity involving child pornography."

The People address in Issue I our contention that the Court of Appeals erred in limiting the prosecution's theory to only distributing and not alternatively, promoting the material. In Issue II, the People address our contention that the Court of Appeals incorrectly construed the intent necessary for a conviction under MCL 750.145c contrary to Legislative intent. In Issue III, the People address our contention that

the Court of Appeals erred in finding that there was insufficient evidence that the defendant distributed the sexually abusive material by returning the computer back to Comcast and that there was sufficient evidence that the defendant distributed and promoted the material through his internet activity of going to various child pornography cites and sharing pictures back and forth with different people on the Internet.

## ISSUE I

**THE COURT OF APPEALS ERRED IN LIMITING THE PROSECUTION'S THEORY TO ONLY DISTRIBUTING AND NOT ALTERNATIVELY PROMOTING THE CHILD SEXUALLY ABUSIVE MATERIAL.**

## STANDARD OF REVIEW

Whether the Court of Appeals erred in its ruling would be a mixed question of law and fact which is reviewed *de novo* by this Court. *People v Marsack,* 231 Mich App 364, 372; 586 NW2d 234 (1998).

## ARGUMENT

The People contend that the Court of Appeals erred by limiting the sufficiency of the evidence claim to only the distribution of the child sexually abusive material of Count 1, Distributing or Promoting Child Sexually Abusive Material. The Court of Appeals incorrectly limited the prosecution because it mistakenly found that the assistant prosecutor at trial did not argue that the defendant promoted child sexually abusive material.

## LIMITING THE PROSECUTION'S THEORY

In its opinion, *People v Tombs,* docket No. 236858, decided December 30, 2003 (12a-22a), the Court of Appeals stated:

> "At trial, the prosecution argued that defendant distributed child sexually abusive material by returning to Comcast the computer that contained such material. The prosecutor also argues on appeal

> that defendant promoted and distributed child sexually abusive material to others over the Internet. While there is evidence supporting this theory of distribution through the Internet, the jury specifically found defendant not guilty of using a computer to promote or distribute child sexually abusive material. Moreover, the jury verdict indicated that defendant only used the Internet or a computer to possess child sexually abusive material. Given the prosecutor's theory that defendant distributed child sexually abusive material by returning to Comcast the computer containing such material and the jury's verdict of acquittal on the charge of using a computer to distribute or promote such material, we conclude that defendant's conviction solely rests upon the theory primarily advanced by the prosecution at trial; that defendant distributed child sexually abusive material when returning to Comcast a computer that contained such material. Accordingly, our review of the sufficiency of evidence is limited to the theory that resulted in defendant's conviction. *People v Tombs,* Docket No. 236858, decided 12/30/03, p.4. (15a)

The People contend that this conclusion is factually inaccurate for two reasons. First, at trial, the assistant prosecutor argued throughout the trial that the defendant promoted child pornographic material by using the Internet and going to child pornography web cites. During his closing argument, the assistant prosecutor stated:

> ". . . but you can also . . . find him guilty of Count I if I only showed that he promoted it."
>
> ***
>
> "If nobody used this stuff, if nobody collected it, if nobody downloaded it, it wouldn't exist. Every time it is downloaded the 6500 plus times it was downloaded by the defendant that's promoting it." (150a).

The assistant prosecutor continued:

> "The more demand, the more there is -- that's promotion. And the computers have promoted it even more than ever. . . . It's been promoted by taking it off the Internet and collecting it. Sharing it with other people in your pedophile club." (151a-152a).

Therefore, the Court of Appeals' finding that the assistant prosecutor did not rely on the alternative theory of promotion of the child sexually abusive material at trial is inaccurate.

Next, the People maintain that the Court of Appeals erred by attempting to use the jury's verdict in Count 2 to justify its inaccurate decision in Count 1. The defendant was charged with Count 1, Distributing or Promoting Child Sexually Abusive Material. Count 2, Using the Internet or a Computer to Distribute or Promote the Material or Using the Internet or a Computer to Possess the Material. The jury found the defendant guilty of Count 1 (Distributing or Promoting Child Sexually Abusive Material) and found the defendant guilty of Count 2 (Using the Internet or a Computer to Possess Child Sexually Abusive Material only).

In justifying its limitation of the prosecution's theory to distributing only, the Court of Appeals used the jury's verdict on Count 2 of only possessing (and not distributing or promoting) as an indication that the jury disregarded the promotion of the material for Count 1.

The People argue that simply because the jury found the defendant guilty of using the internet to possess and not distribute or promote in Count 2 does not necessarily mean that the jury did not believe that the

defendant promoted the material for purposes of Count 1. In fact, there can be any number of reasons why the jury decided how they did. The jury did find the defendant guilty of the distribution or promotion of this material as required by Count 1, the Court of Appeals should not limit that conviction based on the conviction of Count 2.

Additionally, using the Court of Appeals' reasoning, then Count I would be invalid on the distributing aspect as well because the jury did not find the defendant guilty of promoting or distributing the material in Count II. The Court of Appeals reasoning for limiting the prosecution's theory is not justified and is not reasonable in light of the two alternative theories.

Further, juries are free to render inconsistent verdicts. *People v Torres,* 452 Mich 43, 75; 549 NW2d 540 (1996). Therefore, the Court of Appeals erred by limiting the prosecution's theory to only distribution of the material and not also promotion of that material.

## ISSUE II

**THE COURT OF APPEALS ERRED IN ADDING A MENS REA REQUIREMENT CONTRARY TO LEGISLATIVE INTENT.**

## STANDARD OF REVIEW

Whether the Court of Appeals erred in its rulings would be mixed question of law and fact which is reviewed *de novo* by this Court. *People v Marsack,* 231 Mich App 364, 372; 586 NW2d 234 (1998).

## ARGUMENT

The People contend that the Court of Appeals erred by inserting a *mens rea* requirement into the statute contrary to Legislative intent. The primary goal when interpreting a statute is to ascertain and then give effect to the legislative intent of the statute. *People v Riggs,* 237 Mich App 584, 588; 604 NW2d 68 (1999). The legislature is presumed to have intended the meaning that it expressed where the words are clear and unambiguous. *People v Venticinque,* 459 Mich 90, 99-100; 586 NW2d 732 (1998).

MCL 750.145c(3) states in pertinent part:

> "**A person who distributes or promotes**, . . . any child sexually abusive material or child sexually abusive activity is guilty of a felony,. . . if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child . . . " (Emphasis added).

MCL 740.145c(4) states in pertinent part:

> "**A person who knowingly possesses** any child sexually abusive material is guilty of a felony . . . if that person knows, has reason to know, or should reasonably be expected to know the child is a child or that the child sexually abusive material includes a child . . ." (Emphasis added)

**PLAIN MEANING**

Since the Legislature did not define the terms promote or distribute in the statute, it is appropriate to look to the dictionary for their meaning. *People v Morey,* 461 Mich 325, 330; 603 NW2d 250 (1999). Black's Law Dictionary, 8th edition, 2004, defines distributes as 1) to apportion; to divide among several. 2) to arrange by class or order; 3) to deliver; 4) to spread out; to disperse.

Further, it is instructive, although not precedential, to look to applicable statutes in other jurisdictions to see how other jurisdictions define the terms in similar statutes. Nevada defines promote "to produce, direct, procure, manufacture, sell, give, lend, publish, distribute, exhibit, advertise or possess for the purpose of distribution." N.R.S 200.700. Louisiana defines promote "to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, prevent, exhibit, or advertise, or to offer or agree to do the same." LSA-R.S. 14:81.1. Other states, including for example, Kansas, Florida, Texas, and North Dakota use similar language to define the term. In the other jurisdictions, therefore, promote is defined by using distribute or give. Thus using an ordinary or common definition of

distribute would mean giving or disseminating the material. In order to distribute, the actor has to actually do something to get the sexually abusive material to another person. This is in contrast to knowingly possessing the material wherein the actor has to know what he has in his possession is the sexually abusive material so that people who have possession but do not know what they have are not prosecuted. The definition of distribute is not ambiguous as the Court of Appeals claimed. The common ordinary definition of the word would apply in this case where the defendant gave the photographs to the people at Comcast when he returned the computer.

**LEGISLATIVE INTENT**

In looking to the legislative intent, it is important to note that in the instant statute, the Legislature specifically did not include a word such as intentionally or knowingly in (3) of the statute. In section (3), the Legislature wrote, "A person who distributes or promotes. . . ." However, the Legislature did insert "knowingly" in (4) of the statute when it indicated that "A person who knowingly possesses . . .". Since the word knowingly was not added to (3), the Legislature clearly did not want the *mens rea* added to the distribute or promote part of the statute.

The legislative intent of the statute is thus not served by the Court of Appeals inserting a word that the Legislature clearly did not want to add. The Court of Appeals indicates that the intent of the legislature was to "prohibit the dissemination" of child pornography. (*Tombs, supra,* 6)

(17a). That is precisely why the Legislature made sure that the person distributing or promoting the material knew that it was child pornography and not something else.

Additionally, when the Legislature amended the version of MCL 750.145c that applies to this defendant, the Legislature added the "knowing possession" of the child pornography to the law. The Legislature specifically did not change or address the wording of (3) of the statute concerning the distributing and promoting of the child sexually abusive material, but the Legislature did increase the penalty for distributing and promoting the child pornography as evidenced by the two House Legislative Analyses which are included in the People's appendix. (164a-171a)

The House Analyses for the bill indicate the intent of the Legislature in proscribing the distribution or promotion of the child sexually abusive material. The First and Second Analysis indicate at page 2:

> "Crimes that harm children are among the most despicable, and child pornography is a form of child sexual abuse that harms children not only by their direct involvement in producing the materials, but also by the distribution of the photographs and films depicting their sexual activity; the materials become a permanent record of a child's participation." (165a, 169a)

The Court of Appeals relied on *United States v X-Citement Video, Inc,* 513 US 64; 115 S Ct 464; 130 L Ed 2d 372 (1994) for support of its

position that the word knowing modified distributes. However, the People contend that *X-Citement Video* case does not apply to the instant case. In *X-Citement Video,* the United States Supreme Court looked at Title 18 U.S.C. § 2252 (1988 ed. And Supp. V) to determine whether the term "knowingly distributes" in the first part of the statute modified the phrase "the use of a minor" in the second part. In pertinent part, the statute states:

> "(2) **knowingly receives, or distributes**, any visual depiction that has been mailed . . . if --
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit material." (Emphasis added).

Therefore unlike our statute, the statute in *X-Citement Video* already had a scienter requirement that applied to "knowingly distributing" as indicated by Congress in the statute. The question for the Supreme Court was whether the word "knowingly" modified the term "use of the minor" in another section. The Supreme Court found that it did because, of course, the heart of any child pornography protection statute is the protection of the children and that the person has to know that he or she is distributing child pornography and not something else. Congress sought to punish the people who actively seek to give out or disperse this damaging material to other people.

In the instant case, the Legislature specifically did not add a scienter requirement to the distribution or promoting part, but did add it to the portion that dealt with whether the person knew that the material

was child pornography and not something else. Thus the Michigan Legislature specifically wrote a statute that protected children and made sure that only people who distributed or promoted the child pornography would be prosecuted.

Additional support for the People's position that a scienter requirement is not a rational view of the statute is provided by another Court of Appeals opinion, albeit an unpublished one, which was decided less than a month after the instant case. *People v Steiner,* 2003 WL 178775 (Unpublished Court of Appeals Opinion No. 235779)(160a-163a), also analyzed whether sufficient evidence had been offered by the prosecution. The *Steiner* panel stated:

> "To sustain a conviction of distribution of child sexually abusive material the prosecution was required to prove that defendant distributed the sexually abusive material and he knew or had reason to know that the image was that of a child." *Steiner, supra,* page 2. (161a)

Thus the *Steiner* panel viewed the statute as not requiring the prosecution to prove that the defendant knowingly distributed the child sexually abusive material rather as indicated, the prosecution had to prove that the defendant distributed what he knew to be child sexually abusive material.

Additionally, the People note the innocent people that the Court of Appeals claims to help by adding the *mens rea* requirement would not be helped by the Court of Appeals' actions, since all of the witnesses who

looked at the computer (except Williams') knew that pornography was on the computer and still looked at the images.

For the protection of innocent people, the Legislature amended MCL 750.145c(3) since the inception of this case effective March 31, 2003. (3) of the statute now concludes with the line:

> "This subsection does not apply to the persons described in section 7 of the Act No. 343 of the Public Acts of 1984, being section 752.367 of the Michigan Compiled Laws."

MCL 752.367 provides for people who are exempt from the dissemination of the obscene material. Thus the Legislature has acted to correct part of what the Court of Appeals felt necessitated a narrow reading of the term "distributes". The Legislature sought to protect the people that it deemed needed protection as innocent disseminators.

However, it is notable that the Legislature still did not add the word "knowing" to (3) and did not change (3) in any other way. The Legislature meant what it wrote and therefore, this Court should interpret the statute broadly to advance the Legislature's intent. Since the Legislature specifically left out the term "knowingly" from (3) of the statute, the Court of Appeals erred by adding a term that the Legislature specifically did not want included (especially in light of (4)). This Court should correct the lower court's error and find that there is no requirement that the defendant "knowingly" distributed the material. The People should have only had to prove that the defendant distributed what he knew to be child sexually abusive material. In looking at the evidence that was

presented at trial, the People sustained their burden of proof. The Court of Appeals erred in adding a *mens rea* requirement contrary to legislative intent.

## ISSUE III

**THE COURT OF APPEALS ERRED BY HOLDING THAT THE PROSECUTION PRESENTED INSUFFICIENT EVIDENCE THAT THE DEFENDANT INTENDED TO DISTRIBUTE CHILD SEXUALLY ABUSIVE MATERIAL.**

## STANDARD OF REVIEW

Whether the Court of Appeals erred in its ruling would be a mixed question of law and fact which is reviewed *de novo* by this Court. *People v Marsack,* 231 Mich App 364, 372; 586 NW2d 234 (1998).

## ARGUMENT

Assuming *arguendo* that this Court finds that the Court of Appeals did not err in limiting the prosecution's theory or adding the *mens rea* requirement, the People maintain that the Court of Appeals erred in finding that insufficient evidence was presented. The People maintain that sufficient evidence was presented to establish that the defendant intended to distribute the child sexually abusive material when he returned Comcast's laptop to the company. Additionally, sufficient evidence was presented that the defendant distributed and promoted the child sexually abusive material through his Internet activity of downloading and sharing the child pornographic images.

When reviewing a sufficiency of evidence claim, this Court considers the evidence in a light most favorable to the prosecution and determines whether a rational trier of fact could have found the essential

elements of the crime were proven beyond a reasonable doubt. *People v Wolfe,* 440 Mich 508, 513-514; 489 NW2d 748, amended 441 NW2d 1201 (1992). This Court does not determine what inferences are to be drawn from the evidence or the weight of those inferences. *People v Hardiman,* 466 Mich 417, 428; 646 NW2d 158 (2002). Any evidentiary conflicts should be resolved in favor of the prosecution. *People v Harmon,* 248 Mich App 522, 524; 640 NW2d 314 (2001).

**RETURN OF THE LAPTOP**

Sufficient evidence of the defendant's intent to deliver child pornography was presented when the defendant returned the laptop to Comcast. The defendant contacted his supervisor, Christopher Williams, and indicated that he was quitting work. The defendant asked to have the weekend to return his computer laptop and other equipment. Williams advised the defendant (after checking with his boss) that the defendant would have to return the equipment that day. The defendant asked for an hour. As Williams' was driving to pick up the equipment, the defendant called him and told him that everything was ready. (41a-43a).

When Williams' opened up the computer a day later, he checked to see whether it would need to be re-formatted before being given to another employee. (45a-46a). Williams searched for picture or JPG files. Williams clicked on one and saw a picture of a young girl under 10 years old with her breast area exposed since she had no shirt on. Williams

then clicked on another picture and saw the same girl in a different pose. At that point, Williams shut the computer down and gave it to Cliff Radcliff. (47a-49a).

Radcliff was in charge of maintaining the computers and making sure there was nothing offensive or questionable on the computers. (116a). Radcliff knew he was looking for pornography when he turned the computer on. (116a-117a). Radcliff performed a JPG search and found a listing of picture files. (118a). When he viewed the pictures, he found adult pornography and then a series of child pornography. The pictures were very organized in the computer. After viewing two or three of them, Radcliff could not look at anymore. (119a). The pictures were "buried inside" of a user profile. (121a-122a). Radcliff viewed the pictures because it is easier to go through and clean out unneeded files than to eliminate everything in the system and re-install all the necessary software that the technicians need. (123a). The computers are to be used for business purposes only pursuant to company policy. (42a).

St. Clair Shores Police Detective Edward Stack turned on the defendant's computer to see if he could find the questionable material. Detective Stack went to the search mode of the desktop and typed in "asterisk star asterisk JPG" to find the JPG files. (137a). Detective Stack then received a list of 2,137 JPG files. The detective went to some of them, at first he found photographs of adults and then photographs of sex acts and then he found photographs of children. (138a).

Oakland County Sheriff Sergeant Joseph Duke is an expert in computer forensic examinations and computer crimes investigation. (52a-54a). Sergeant Duke received the defendant's laptop and removed the hard drive from the computer so that the data could be acquired in a controlled environment. (57a-59a).

On the hard drive of Comcast's laptop computer, Sergeant Duke found over 500 images that he believes qualify as child sexually abusive material or child erotica. (61a). In fact, overall, Sergeant Duke found and documented 6500 photographs that qualify as child sexually abusive material in computers that belonged to the defendant. (60a).

Sergeant Duke explained that a portion of the Internet, Usenet, is a group of computers that are host computers or servers. They provide information when someone requests it. Special interest groups use them to host news groups. Some of the news groups are used for trading information on molesting children fantasies and child pornography. (62a). The defendant's laptop has a program installed "xnews.exe" which is a Usenet newsgroup. This would allow the computer user to log onto the Usenet, subscribe to the newsgroups as well as download messages and files from Usenet. (104a-106a). A cable Internet service must be used to access Usenet. (109a-110a).

When requesting information, the user is communicating by telling the server to send you certain information and then it sends it to your computer. Sergeant Duke testified that "there's constant two-way

communication going on" between the user and the server computer. (111a-112a).

A wiping or deleting program had been installed into the hard drive of the laptop computer, but the sergeant could not determine whether the wiping program was used on August 8, 2000. (113a). In less than 15 minutes, files could be deleted from a computer. (107a-108a).

Sergeant Duke did determine that the defendant used the Internet with Comcast's computer because it had Internet access installed and had saved temporary Internet files. (63a). Sergeant Duke testified that People's Exhibit 2 are 78 images which were taken from the hard drive of the defendant's Comcast computer. (64a-65a, 71a-72a). The data was hidden 7 directory levels down. (70a). Sergeant Duke then described each of the images, when they were created and whether in his expert opinion they were of child sexually abusive material. (73a-92a, 94a-103a). Sergeant Duke testified that the images were taken from Internet websites. (92a). These pictures show young children with their genitalia exposed. Some children are crying. These pictures also show adult males further abusing these children by inserting their fingers and penises into the children's vaginas and buttocks and having the children perform fellatio on the adult males.

Sergeant Duke described the first picture of a naked female between 8 and 10 years old laying on her back with her genitalia exposed. (73a). This picture came from Usenet. (74a). Another Usenet

picture was contained in a series that the sergeant has seen before. The picture showed the:

> "same 6 year old child lying on her back. Her pants are now pulled down around her knees. Her genitalia is exposed. She's still crying. This is child sexually abusive material from my experience." (76a-77a).

Another picture showed:

> "the same 6 year old female child. This time on her back holding her ankles apart. She's crying. Again, she's completely nude with the exception of whatever that is on her neck. The focus of the photograph is on her anus and on her vagina. The child is crying." (78a).

Another picture showed the little 6 year old girl:

> "lying on her stomach. There is an adult male straddled behind her between her legs inserting the tip of his penis in between her buttocks." (81a).

Another picture was of the 6 year old girl:

> "She has her right hand on an adult, this time fully erect penis. Its being pressed up against her mouth." (86a).

Another picture showed a girl between 13 and 15 years old:

> "naked on all fours on a bed. She is gaged (sic) with a ball bound some type of a strap around the back of her neck; and there is what appears to be a whip resting across her buttocks." The picture also showed an artificial penis near the girl's knee. (91a).

FIA worker David Joseph spoke to the defendant following a referral. (125a-129a). The defendant, at first, denied that the pictures were his, however the defendant ultimately admitted exploring pornography through the Internet. The defendant started with adult

pornography and then found child pornography and indicated that he began to get pictures from the Internet. The defendant admitted to downloading and sharing the photographs with others. The defendant believed that when he returned the Comcast Computer, no one would go through the individual files, but rather the hard drive would be deleted. (131a-134a).

The defendant had thought he would have more time than he ended up having to clean the computer of the images. (133a-134a). The defendant also stated that he was part of a club that would exchange and give child pornography. (134a-135a).

In *People v Steiner,* 2003 WL 178775 (Unpublished Court of Appeals Opinion No. 235779)(160a-163a), the prosecution contended that the defendant had sent child sexually abusive pictures over the Internet to a chat room and to an undercover officer. The *Steiner* Court indicated that since the defense conceded at trial that the pictures were child sexually abusive material, the question for the Court of Appeals was:

> "whether the prosecution proved defendant distributed the child sexually abusive material. This did not require that the prosecution prove every reasonable theory consistent with the defendant's innocence, but instead that it introduce evidence sufficient to convince a rational jury of defendant's guilt in the face of defendant's contradictory theory that he was the victim of a "Trojan Horse" virus or unscrupulous employees using his screen name." *Steiner, supra,* page 2 (161a).

Therefore, the Court of Appeals indicated that it was not the prosecution's function to disprove every reasonable theory consistent with the defendant's innocence. In the instant case, however, that is precisely the standard that the Court of Appeals held the prosecution to. In its opinion, the Court of Appeals indicates that the prosecution witnesses "more fairly be characterized" as distributing the material than the defendant because "the prosecution's witnesses distributed the computer with instructions on how to make the child sexually abusive material accessible, while the material that defendant distributed was not accessible to the average person". *Tombs, supra,* p 8 (19a).

First, the People argue that that passage indicates that the Court of Appeals was holding the prosecution to a higher standard of proof. It is inaccurate to say that the prosecution witnesses distributed the material since during the course of their employment the material was discovered. The prosecution witnesses did not actively seek out this material by visiting child pornography web sites or asking that this material be given to them.

Second, while the Court of Appeals notes that the defendant "distributed" the material, it is not true that it was not accessible to the average person since Detective Stack, who was not computer savvy, was able to easily access the information.

Further, it is important to note that the defendant did not give or distribute that material to an average person, the defendant gave that

material to another computer savvy technician who easily was able to access the information. Additionally, the defendant knew whom he was giving the computer to and knew that they were computer savvy. The defendant did not give the pictures via the computer to people who would not be able to access them. The defendant gave the computer back to people who the defendant knew had the skills to easily access his child sexually abusive pictures. Thus the Court of Appeals, not only sought to have the People dispel all theories of innocence, the Court of Appeals was inaccurate factually in its analysis.

Viewing the evidence in a light most favorable to the prosecution, sufficient evidence of intent to distribute was presented. The defendant picked the date on which to quit work knowing that his computer contained all of these child sexually abusive materials and knowing that he would have to return the computer to Comcast upon leaving work. While the defendant may have thought that he would have a few days to clear out the pictures, when the defendant was informed that he had to return the computer that day, the defendant indicated he would have it ready in an hour and then called prior to that hour being up to indicate that the computer along with everything else was ready to be picked up. The defendant was a computer technician, someone who dealt with computers everyday for his livelihood, the defendant knew that the information was contained in the computer when he gave it to back to Comcast. The defendant could have easily erased the photographs, but

did not. Sergeant Duke testified that it would take only 15 minutes to erase the pictures, the defendant had ample time to erase the pictures, if he had intended to do that.

Further, while there was testimony that the photographs were "buried" within the defendant's user profile, the photographs were easily accessible to the other technicians and to Detective Stack, who merely did a search of JPG (photograph files) and found the photographs. Detective Stack indicated that he was not as computer savvy as the Comcast technicians or Sergeant Duke. Additionally, while the defendant told David Joseph that he thought the computer hard drive would just be erased, this is a self-serving statement from the defendant who was responding to an FIA investigation of whether he was a fit parent. The defendant attempted to minimize his involvement with this material in order to maintain contact with his own children. The technicians testified that it was easier to take out anything improper rather than re-installing everything that the technicians needed to do their work.

The defendant's actions are the type that the Legislature was trying to prevent in creating this statute. The defendant gave Comcast his computer knowing the child sexually abusive material was contained in Comcast's laptop. As a knowledgeable computer technician, the defendant could have erased the images if he chose to, instead the

defendant chose to deliver those images back to Comcast when he returned the laptop.

The defendant's actions of returning Comcast's computer with the images in the computer is similar to returning a Comcast manual with these images in it. The effect of distributing the images is the same. The defendant gave the images back to Comcast in a container which could be easily accessed and distributed to the receiver.

The Court of Appeals erred in its finding of insufficient evidence since when viewing the evidence in a light most favorable to the prosecution, sufficient evidence was presented that the defendant intended to distribute child sexually abusive material.

**INTERNET CHILD PORNOGRAPHY ACTIVITY**

Additionally, the defendant distributed and promoted this material by visiting these web cites and user groups to obtain the 500 child sexually abusive images that were found on his computer and by sharing pictures with others on the internet.

On the hard drive of Comcast's laptop computer, Sergeant Duke found over 500 images that he believes qualify as child sexually abusive material or child erotica. (61a). In fact, overall, Sergeant Duke found and documented 6500 photographs that qualify as child sexually abusive material in computers that belonged to the defendant. (60a).

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information when someone requests it. Special interest groups use them to host news groups. Some of the news groups are used for trading information on molesting children fantasies and child pornography. (62a). The defendant's laptop has a program installed "xnews.exe" which is a Usenet newsgroup. This would allow the defendant or any computer user, to log onto the Usenet, subscribe to the newsgroups as well as download messages and files from Usenet. (104a-106a). A cable Internet service must be used to access Usenet. (109a-110a).

When requesting information, the user is communicating by telling the server to send you certain information and then it sends it to your computer. Sergeant Duke testified that "there's constant two-way communication going on" between the user and the server computer. (111a-112a).

Sergeant Duke did determine that the defendant used the Internet with Comcast's computer because it had Internet access installed and had saved temporary Internet files. (63a). Sergeant Duke testified that People's Exhibit 2 are 78 images which were taken from the hard drive of the defendant's Comcast computer. (64a-65a, 72a). Sergeant Duke then described each of the images, when they were created and whether in his expert opinion they were of child sexually abusive material. (73a-92a, 94a-103a). Sergeant Duke testified that the images were taken from Internet websites. (92a).

Additionally, the defendant admitted to downloading and sharing child pornography with other people. (131a-134a). The defendant also stated that he was part of a club that would exchange and give child pornography. (134a-135a).

Viewing the evidence in a light most favorable to the prosecution, sufficient evidence was presented that the defendant either intended to distribute or intended to promote child sexually abusive material by using the Internet and these web sites to exchange and download child sexually abusive pictures. The defendant admitted to sharing pictures with people through the Internet as well as visiting these web sites. These child pornographic web sites would not exist without predators like the defendant seeking out this material which victimizes children. The Court of Appeals erred in finding that insufficient evidence was presented.

## RELIEF REQUESTED

The People, Plaintiff-Appellant, respectfully requests that this Court **REVERSE** the Court of Appeals, and **REINSTATE** the defendant-appellee's conviction and sentence for Distributing or Promoting Child Sexually Abusive Material.

Respectfully submitted,

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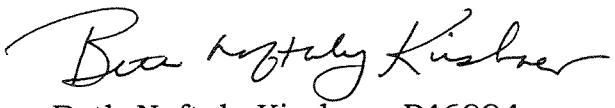

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